IN THE

Supreme Court of the United States

October Term, 1976

No. 76-57

THE FIRST NATIONAL BANK OF CHICAGO,
Petitioner,

v.

STEVEN GOLDMAN, *et al.*,
Respondents.

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Joseph DuCoeur
Alan I. Becker
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601
Attorneys for Petitioner,
The First National Bank
of Chicago

August 31, 1976

La Salle Street Press — Chicago
Printed in U.S.A.

TABLE OF AUTHORITIES CITED

Cases

Statutes

Other

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-57

THE FIRST NATIONAL BANK OF CHICAGO,
Petitioner,

v.

STEVEN GOLDMAN, *et al.*,
Respondents.

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The petition demonstrates that this case presents an important issue under the Truth in Lending Act deserving plenary review by this Court. Moreover, the decision below conflicts with the decisions of at least two other circuits, requiring resolution by this Court. Respondent Goldman's attempt to narrow the import of this case is not only unavailing,* but his analysis of the decision below gives rise to further conflicts with the decisions of two additional circuits and with this Court's only prior decision in a Truth in Lending case.

A right of action under the Truth in Lending Act does *not* depend on the imposition of a finance charge, contrary

---

* The impact of the decision below will be monumental. As of December 31, 1972, there were 33,870,000 bank credit card accounts alone in the United States, and undoubtedly many millions of other open end credit accounts. *See* Federal Reserve Bull., Sept. 1973, at 646.

to Goldman's basic argument. (Opp. at 4, 9-13). In *Mourning* v. *Family Pub. Services, Inc.*, 411 U.S. 356, 376 (1973), this Court stated:

> "We are also unable to accept respondent's argument that § 130 [15 U.S.C. § 1640] does not allow imposition of a civil penalty in cases where no finance charge is involved. . . ."

Goldman nonetheless argues that the decision below is based on the proposition that the imposition of a finance charge is the appropriate "trigger" for a claim under the Truth in Lending Act. (Opp. at 12). But in *Eby* v. *Reb Realty, Inc.*, 495 F.2d 646, 651 (9th Cir. 1974), the court concluded that the imposition of a finance charge was *not* a "trigger upon which liability was to depend." *Accord, Sellers* v. *Wollman*, 510 F.2d 119, 123 (5th Cir. 1975). To the extent the decision below was grounded on the proposition that "until a finance charge is imposed there ordinarily is no right of action. (A.19)" (Opp. at 4), the clear conflict between that holding and the decisions in *Mourning, Eby,* and *Sellers* is more than ample reason for this Court to grant plenary review of the decision below.*

* Goldman disingenuously quotes *part* of 15 U.S.C. § 1640(a)(2)(A), which provides for a civil penalty—not damages—of "twice the amount of any finance charge in connection with the transaction . . ." (Opp. at 11-12), but he omits the statutory provision that immediately follows, which further provides for a minimum penalty of $100 regardless of whether a finance charge had been imposed.

Goldman also misstates this Court's holding in *Mourning* when he argues that "In *Mourning* there was a real finance charge but it was concealed." (Opp. at 12). This Court observed that a merchant might bury the "cost of credit" in the price of his goods, 411 U.S. at 366, but did not call that a "finance charge," and expressly held that "imposition of the minimum sanction is proper in cases such as this, where the finance charge is nonexistent or undetermined." *Id.* at 376. Under Goldman's present argument, a finance charge must have been buried in the cost of the item he purchased the first time he obtained credit from the Bank, which occurred more than one year before he filed suit. The court below, however, declined to use that extension of credit as the benchmark, but instead deemed the first imposition of finance charge to be the first occasion Goldman specifically incurred a finance charge. (A. 19).

There is, in short, no requirement that a debtor suffer injury to have a cause of action under the Truth in Lending Act. In fact, the Truth in Lending Act as originally enacted did not allow any action for damages, 15 U.S.C. § 1640(a) (1970); in October, 1974, Congress added a provision for the recovery of damages, if any, in addition to the civil penalty. 15 U.S.C. § 1640(a) (Supp. V, 1975), *amending* 15 U.S.C. § 1640(a) (1970). Thus, damages now may be sought, but they are not a condition precedent to the maintenance of an action. As Judge Frankel held in *Ratner* v. *Chemical Bank New York Trust Co.*, 329 F.Supp. 270, 280 (S.D.N.Y. 1971):

> "There is no requirement that the plaintiff prove he himself was deceived. There is no requirement that he should have been led by the deception to pay the 'finance charge in connection with the transaction***.' "

The court in *Ratner* subsequently concluded that the borrower had not been damaged, but awarded a penalty of $100. *Ratner* v. *Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 413, 416 (S.D.N.Y. 1972). *See also Meyers* v. *Clearview Dodge Sales, Inc.*, 384 F.Supp. 722, 729 (E.D. La. 1974).

Nor was there any reason for Goldman to wait until a finance charge was imposed in order to perceive the alleged injury or violation of which he complained. Goldman argues that the disclosure he challenged was required only in the initial disclosures under 15 U.S.C. § 1637(a) and not in the periodic disclosures under 15 U.S.C. § 1637(b), so that a comparison of disclosures would not be possible. (Opp. at 8). Goldman's contention is false. 15 U.S.C. § 1637(a)(3) requires the creditor to disclose at the time the account is opened the method of calculating the finance charge. 15 U.S.C. §§ 1637(b)(5) and (8) require in each periodic billing statement disclosures which together constitute a complete explanation of the method of calculating the finance charge, *in even more detail than the initial disclosure.*

The Truth in Lending Act is fundamentally concerned with disclosure of important credit information and not with alleged injury to any particular borrower which is not typically present in any event. To achieve its purpose of creating rigorous, but definite, standards of disclosure, it is important that all provisions, including the statute of limitations, mean what they say. The meaning should not vary depending on the circumstances of a particular case, such as whether a borrower alleges injury.

Unless this Court accepts the proposition that the requirements of the Truth in Lending Act should vary from case to case with neither borrower nor lender able to know whether the law has been complied with until a trial is held, the decision below cannot be narrowly confined. Instead, it remains a decision that excises the unconditional statutory requirement that a Truth in Lending action be brought within one year after the disclosure was made or required to be made. It also remains a decision squarely in conflict with at least two other circuits and one that promises to disrupt the balanced enforcement scheme created by Congress.

For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Joseph DuCoeur
Alan I. Becker

Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601
312-861-2226

Attorneys for Petitioner,
The First National Bank
of Chicago

August 31, 1976